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Attorneys for Debtors BCE West, L.P. et al.

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

In Re:	)	
	)	Chapter 11
BCE WEST, L.P., et al.,	)	
	)	Case No. 98-12547 through
Debtors.	)	98-12570 ECF CGC
	)	
EID: 38-3196719	)	Jointly Administered
	)	
	)	<b>DEBTORS' MOTION FOR</b>
	)	<b>AUTHORITY TO</b>
	)	<b>COMPROMISE AND SETTLE</b>
	)	<b>WITH HARRY'S FARMERS</b>
	)	<b>MARKET, INC.</b>
	)	
	)	<b>Date: August 24, 1999</b>
	)	<b>Time: 10:00 a.m.</b>
	)	<b>Place: 10<sup>th</sup> Floor</b>
	)	<b>Courtroom 6</b>
	)	<b>Phoenix, Arizona</b>

Boston Chicken, Inc. ("BCI") and Progressive Food Concepts, Inc. ("PFCI"), debtors and  
debtors in possession (the "Debtors") request the Court to enter an order pursuant to 11 U.S.C. § 105

1 and Rule 9019 of the Federal Rules of Bankruptcy Procedure authorizing the Debtors BCI and PFCI  
2 to compromise and settle the claim described herein. In support of this Motion, Debtors state as  
3 follows:

4 **I. JURISDICTION**

5 1. Pursuant to 28 U.S.C. §§ 1334 and 157, the Court has jurisdiction to hear this Motion.  
6 Pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B) and (O) this Motion presents a core proceeding.  
7

8 **II. BACKGROUND**

9 2. On October 5, 1998 (the "Petition Date"), the Debtors filed voluntary petitions for  
10 relief under Chapter 11, Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code"), in  
11 the United States Bankruptcy Court for the District of Arizona (the "Court"). Pursuant to Sections  
12 1107(a) and 1108 of the Bankruptcy Code, the Debtors are operating their businesses and managing  
13 their property as debtors in possession.  
14

15 3. Prior to the filing of these Chapter 11 cases, PFCI entered into a series of transactions  
16 with Harry's Farmers Market, Inc. ("HFMI"), a public company which owns and operates  
17 supermarket mega stores and convenience stores specializing in high-end perishable food products in  
18 the Atlanta, Georgia area. HFMI was to be the vehicle through which BCI, under prior management,  
19 was going to learn how to do "fresh stores" and which formed the basis of the Boston Market store  
20 conversions in Charlotte, North Carolina.  
21

22 4. The series of transactions between PFCI and HFMI dating from January 1997, as  
23 modified in November 1997, basically provided as follows:

24 (i) PFCI made a \$12 million subordinated loan (the "Refinancing Loan") to HFMI  
25 which is mandatorily convertible on January 31, 2002 into shares of HFMI's Series B  
26 preferred stock (which have no dividend or redemption rights) and which in turn are  
convertible into approximately 3,000,000 shares of HFMI's Class A no par value common

1 stock (equal to approximately 19.6% of the total HFMI equity, but only approximately  
2 8.9% of the vote, on a fully diluted basis). Until conversion, the loan bears interest at 5%  
3 per annum.

4 (ii) PFCI made a \$3.5 million subordinated loan to fund certain development costs (the  
5 "Development Loan") which was convertible (at PFCI's option) for HFMI's preferred  
6 stock (which have no dividend or redemption rights) and which in turn are convertible into  
7 approximately 875,000 shares of HFMI's Class A no par value common stock (equal to  
8 approximately 5.7% of the total HFMI equity, but only 2.6% of the vote, on a fully diluted  
9 basis). Until January 31, 2002, the loan bears interest at 5% per annum and thereafter the  
10 interest increases to the prime rate plus 1%. If not converted, the loan will start to  
11 amortize after January 31, 2002 and is payable, commencing April 1, 2002, over 5 years  
12 (with quarterly payments based on a 10 year amortization), thereby leaving a balloon  
13 payment due on April 1, 2007. Under the terms of the Development Loan, PFCI was to  
14 loan an additional \$2,000,000 to HFMI on November 2, 1998. However, this final funding  
15 was never made and HFMI has timely filed a proof of claim against PFCI for breach of  
16 contract in the amount of \$2,888,995 representing alleged damages it sustained as a result  
17 of PFCI's failure to fund the obligation.

18 (iii) PFCI acquired warrants to purchase up to an additional 2,000,000 shares of  
19 HFMI's Class A common stock at exercise prices ranging from \$4.00 to \$5.50 (HFMI's  
20 common stock was trading at \$6-5/16 per share on January 31, 1997, when the warrant  
21 was purchased; it has traded consistently under \$2.00 per share since April 1998 and  
22 consistently under \$1.00 per share since May 1999; it is currently trading between \$0.75  
23 and \$1.00 per share at very low volume) .

24 (iv) In exchange for other consideration, PFCI acquired from HFMI via a newly created  
25 intellectual property trust the beneficial interest in and the exclusive license to use all of  
26 HFMI's intellectual property rights outside the States of Georgia and Alabama (the license  
is currently non-exclusive as to South Carolina, North Carolina and Tennessee and  
becomes non-exclusive worldwide on January 31, 2004), subject to certain restrictions and  
to PFCI's servicing obligations.

(v) HFMI, PFCI and Mr. Harry Blazer, the President and Chief Executive Officer of  
HFMI, entered into a five-year mutual consulting arrangement.

5. The Refinancing Loan and Development Loan were secured by guaranties of certain  
of HFMI's subsidiaries, HFMI's pledge of certain of its subsidiaries' stock, collateral assignments of  
three leases, mortgages and collateral assignments of leases and rents on three parcels of real property  
and a pledge of HFMI's ownership certificate in the intellectual property trust. PFCI's position in  
HFMI's collateral is all subordinate to the outstanding debt owed by HFMI to its senior lender.

Furthermore, in October, 1997, PFCI guaranteed and pledged its assets to secure BCI's debt under the 1996 loan agreements and subsequently under the debtor-in-possession credit facility.

### III. RELIEF REQUESTED

6. BCI, PFCI and HFMI entered into negotiations to resolve their business relationship. The settlement contemplates a complete termination of the business relationship between HFMI and PFCI, releases of all claims being given by each party, and payment by HFMI to the Debtors of \$4,000,000 in cash (the "Settlement Amount") at the closing of the settlement between the parties which would occur on or before thirty (30) days (or on some later date with the mutual consent of the parties) after the order approving this Motion has been entered.

7. Specifically, upon receipt of the Settlement Amount by PFCI:

(i) HFMI would be deemed to have satisfied all outstanding obligations under the loan agreement and the promissory notes delivered in connection therewith and the loan agreement and notes would be terminated.

(ii) all warrants and options agreements for the purchase of HFMI capital stock which were issued to PFCI would be deemed terminated and PFCI would return to HFMI such documents as unexercised.

(iii) PFCI would either, at the option of HFMI, convey to HFMI its intellectual property related to HFMI or terminate its rights to use such intellectual property (including terminating the trust agreement relating to the intellectual property).

(iv) each of HFMI, Harry A. Blazer and PFCI would release the other parties from all claims and obligations including all of their obligations under the consulting agreements and HFMI's \$2,888,995 claim against PFCI and PFCI's servicing obligations for the intellectual property.

8. HFMI's offer is conditioned on its ability to obtain financing to borrow the Settlement Amount and its ability to obtain the consent of its senior lender for such transaction. HFMI has advised the Debtors that it has been diligently working to obtain this financing (and has engaged the services of an investment banker to assist in its efforts) and is highly confident that it

1 will be able to obtain such financing on a timely basis. HFMI has further advised the Debtors that  
2 if such financing is obtained, getting the consent of its senior lender should not be an impediment  
3 to concluding the compromise and settlement.

4 9. In their capacity as debtors in possession, the Debtors are given authority to enter into  
5 compromise and settlement agreements subject to Bankruptcy Court approval. Rule 9019,  
6 Fed.R.Bankr.P; 11 U.S.C. § 105. The Debtors have authority to make difficult business decisions in  
7 the administration of the estates, which include the settlement of claims against the estate. Although  
8 the debtor in possession has the initial burden of proof with regard to compromise and claims, the  
9 ultimate inquiry is whether the proposed action is in the estates' best interests. *In re McNallen*, 197  
10 B.R. 215 (E.D. Va. 1995).

11 10. The Debtors in this case believe that the settlement which is proposed by this Motion  
12 is in the best interests of the estates. The Debtors have exercised their best business judgment in  
13 negotiating and entering into this settlement. Moreover, the settlement of the claim or controversy  
14 should be approved if it is reasonable or in the best interests of the estates. *United States v. Alaska*  
15 *National Bank of the North (In the Matter of Walsh Construction, Inc.)*, 669 F.2d 1325, 1328 (9<sup>th</sup> Cir.  
16 1982).

17 11. Although the Debtors do not anticipate an objection of this settlement, the objection  
18 of a single or major creditor of an estate to a settlement or compromise, should be noted by the Court  
19 but is definitely not controlling. *In re General Store of Beverly Hills, Inc.*, 11 B.R. 539 (9<sup>th</sup> Cir. BAP  
20 1981); *John S. Morandas PC v. Bishop (In re Sassalos)*, 160 B.R. 646  
21 (D. Ore. 1993). The approval of a settlement and compromise over a creditor's objection can only be  
22 overturned for an abuse of discretion. *Alaska National Bank*, 669 F.2d at 1328.

12. Approval of a settlement or compromise requires the consideration of the following factors: (1) probability of success in litigation; (2) difficulties in collecting; (3) complexity, expense, inconvenience and delay; and (4) paramount interests of creditors. *In re Sassalos*, 160 B.R. at 653, citing *In re Woodson*, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). In this case, the settlement is in the best interests of the creditors because BCI and PFCI believe that the Settlement Amount represents an immediate, cost-effective and risk-free liquidation of this asset for at least its present value, without the otherwise inherent time and expense that would be incurred in having this relationship play out. The creditors of these estates will be best served if this asset can be expeditiously liquidated.

13. The Settlement Amount shall be placed in escrow by the Debtors with any valid liens attaching thereto. Disposition of the Settlement Amount shall be subject to separate order of this Court.

WHEREFORE, Debtors seek an Order from this Court allowing them to enter into the settlement with HFMI as described here in this Motion.

DATED this 2nd day of August, 1999.

By: /s/ H. Rey Stroube, III  
One of their Attorneys

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- and -

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 2 or 3, 1999, the foregoing document was served by e-mail or by first class United States mail, postage prepaid, on all parties on Master Service List #11 dated July 22, 1999 and on the parties listed below:

Harry's Farmers Market, Inc.  
Attention: Harry A. Blazer  
1180 Upper Hembree  
Roswell, GA 30076

Alston & Bird LLP  
Attention: Al LaFiandra  
One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424

\_\_\_\_\_  
/s/ Laura DeWitt